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60-Second Memo

February 24, 2010

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EEOC Powers Are Broad, But Not Unlimited

By Marcie B. Cornfield, Esq.

The Equal Employment Opportunity Commission ("EEOC") may have broad statutory and investigative powers, but it does not have license to just "sue first and investigate later," according to a recent federal court decision.^[1] In a February 9, 2010 ruling^[2], U.S. District Judge Linda Reade ordered the EEOC to pay CRST Van Expedited, Inc. ("CRST") nearly \$4.5 million in costs and attorneys' fees after the EEOC "wholly abandoned its statutory duties" in a class action lawsuit by failing to conduct "any investigation" of the merits of the allegations of certain class members.^[3]

The EEOC's case against CRST began with an investigation of a single allegation of sexual harassment, but it eventually ballooned into a class action lawsuit involving 270 female employees and former employees of CRST that allegedly had been subject to unlawful harassment. Ultimately, however, the Court's rulings on various summary judgment motions left only 67 allegedly aggrieved women in the EEOC's class. Judge Reade's ruling, which dismissed the claims of these remaining 67 women, serves as a reminder that the EEOC must follow certain statutory procedures prior to starting class action litigation against an employer. As Judge Reade noted, in this case the EEOC:

- Failed to investigate the specific allegations of any of the 67 allegedly aggrieved persons until after filing the complaint against CRST. The EEOC neither interviewed witnesses nor subpoenaed any documents to determine whether any of their allegations were true.
- Failed to identify any of the 67 allegedly aggrieved

persons as members of the Letter of Determination's "class" until after it filed the complaint. In fact, prior to filing the complaint, the EEOC responded to CRST inquiries as to the size of the class by stating that it did not know the size of the class. The EEOC also impermissibly kept the definition of its class vague, thereby prohibiting any meaningful attempt at conciliation.

- Failed to make a reasonable cause determination as to the specific allegations of any of the 67 allegedly aggrieved persons prior to filing the complaint. Moreover, at the time the EEOC issued its Letter of Determination, 27 of the remaining 67 allegedly aggrieved persons *had not yet made any allegations of harassment*. Moreover, while 38 of the remaining 40 allegedly aggrieved persons had alleged sexual harassment prior to the EEOC issuing its Letter of Determination, the EEOC admitted that it was unaware of their allegations until after it filed its complaint. The EEOC essentially used discovery to find the members of the class that it should have found prior to starting litigation.
- Failed to attempt to conciliate the specific allegations of the allegedly aggrieved persons prior to filing the complaint.

In addition to delineating the powers of the EEOC in class action investigations and litigation, Judge Reade's ruling serves as a handy reminder that employers are not powerless when the EEOC begins an investigation or litigation. Employers should consider the following during EEOC investigations and when litigating matters against the EEOC:

- **EEOC Investigations Must Be Reasonable:** EEOC investigations may become overbroad and unduly burdensome, with the EEOC requesting information that seems either daunting or impossible to compile. Attempt to work with the EEOC to narrow the scope of any seemingly unreasonable request, and place your objections and requests in writing.
- **Attempt to Conciliate and Ask for Information:** The EEOC has an obligation to attempt conciliation in good faith. Use that to your advantage. Attempt to conciliate the matter, and place all conciliation efforts and offers in writing. In your conciliation efforts, remember that you are not bound by the information the EEOC has voluntarily given you. Ask for more information as to the EEOC's position and allegations if you need it.
- **Attempt to Obtain Information from the Investigator:** If the EEOC litigates the matter, the

EEOC's file cannot be obtained pursuant to a Freedom of Information Act request during litigation. Therefore, it is important to obtain information from the investigator and to ask specific questions. CRST, for example, asked for further information on the EEOC's class in regard to conciliation efforts, and the EEOC's failure to even attempt to provide such information later helped CRST defeat the EEOC in court.

- **Put it in Writing:** All efforts to cooperate with the investigative process and all conversations with the investigator should be confirmed in writing. This will prevent any possible disagreement over the extent of your cooperation with the EEOC, and it will be necessary should you later be forced to show a lack of good faith by the EEOC. If an investigator makes unreasonable statements or appears biased, confirm your conversation with that investigator and the investigator's statements in writing to the EEOC. Not only may a supervisor stop the investigator, but your written records may serve as evidence that the EEOC had pre-determined the end result before even gathering most of the evidence it requested.
- **Do Not Be Intimidated:** Question the pleadings and be familiar with the EEOC's investigative process. If it appears that the EEOC filed suit before investigating the matter, you may be able to assert that the EEOC did not investigate in good faith. Furthermore, do not assume that because a government agency is suing you that it will be able - or willing - to aggressively litigate. In other words, you may want to be just as aggressive as you would be in defending any other case against a private plaintiff's firm.
- **If Necessary, Consider Drastic Remedies:** If you think the case is frivolous and would otherwise merit sanction, consider seeking the same measures, such as a Rule 11 motion, against the government as you would against a private plaintiff's firm.

As Judge Reade stated, "the government, like its citizens, must follow the law. The EEOC must respect Title VII's administrative scheme and follow the clearly delineated paths to justice that Congress has created."^[4] Know your rights as a company when engaged in investigative and conciliatory efforts with the EEOC, and be aware that the EEOC, in its attempts to bring its case against you, be it on an individual claim or class action basis, must follow the rules.

^[1] *Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc.*, 2009 WL 2524402, at *19 (N.D. Iowa Aug. 13, 2009).

^[2] *Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc.*,

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2010 WL 520564 (N.D. Iowa Feb. 9, 2010).

[3] *Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc.*, 2009 WL 2524402, at *19 (N.D. Iowa Aug. 13, 2009).

[4] *Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc.*, 2009 WL 2524402, at *19 (N.D. Iowa Aug. 13, 2009).

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